Torts -- Malpractice -- Liability of Physician for Acts of Substitute

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Supplement U tax if derived from dividends, interest, annuities, royalties, rents, gains from the sale of property, or research.[22] Such income is not taxable because it is considered to be passive in nature and not to have a harmful effect on competition.[23]

The new law does not deprive an organization of its tax exemption or require it to dispose of its unrelated business.[24] The tax is imposed only on unrelated business income in excess of $1,000.[25] The related income of an exempt organization will continue to be exempt as under the old law.[26]

The new tax became effective with taxable years beginning after December 31, 1950.[27] Organizations taxable as corporations will pay the normal rate of 25 per cent on their unrelated business income and a surtax of 20 per cent on such income over $25,000;[28] however, these rates may be changed by current legislation proposing increases in corporation tax rates and an excess profits tax. Organizations taxable as trust will be taxed at the same rate as individuals.[29] Also of importance is the fact that the tax is imposed on the net unrelated income in order that losses on one unrelated venture may be offset against gains on another.[30]

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Torts—Malpractice—Liability of Physician for Acts of Substitute

The liability of a physician[1] to a patient for malpractice is dependent upon the existence of a physician-patient relationship, or upon a relationship based on contract. Absent a special contract to the contrary, a physician-patient relationship is brought into existence upon acceptance of the patient for treatment, and such relationship may be terminated by mutual consent, dismissal of the physician by the patient, determination by the physician that his services are no longer needed, or reasonable notice to the patient in order that that patient may have an

[22] INT. REV. CODE §422(a). Rents from real property (including personal property leased with real property) are excluded from the Supplement U Tax. However, income from a lease of a term of five years or more will be taxed in the proportion that any unpaid debt on the rented property at the close of the taxable year bears to the adjusted basis of such property. A gain from the sale of property is defined as property other than stock in trade or property held for sale to customers. Research, as used in this section is defined as research performed for the United States or its agencies, or any state or subdivision thereof, research performed by any university or hospital for any person, and research done for any person by an organization designed to carry on fundamental research if the results are made available to the public.

[23] SEN. REP. No. 2375, 81st Cong., 2d Sess. 30 (1950).

[24] SEN. REP. No. 2375, 81st Cong., 2d Sess. 29 (1950).

[25] INT. REV. CODE §421(c).

[26] INT. REV. CODE §421(b)(1).

[27] INT. REV. CODE §421(a).

[28] INT. REV. CODE §421(a)(1).

[29] INT. REV. CODE §421(a)(2).

[30] INT. REV. CODE §422(a)(6).

[1] Reference to physicians throughout this article also includes surgeons.

opportunity to engage the services of another.[2] It has also been held, though there is little authority on the point, that a physician, who possesses no peculiar personal qualifications and no special knowledge of the patient's malady, may discharge his patient by substituting in his place another physician who possesses a proper amount of skill and is a duly careful person.[3] This seems to be the general rule and a substitution under these circumstances severs the physician-patient relationship between the first physician and his patient, and thereby relieves the first physician of liability for the negligence or malpractice of the substitute. But where the substitution is not made in accordance with this rule, liability may be incurred by the first physician for the negligence of the substitute.

This question of liability of a physician for the acts of a substitute physician arose in the early North Carolina case of *Nash v. Royster*.[4] There, after an operation, the attending physician left town for a period of two weeks and upon leaving, turned his patient over to the care of another physician without notice to, or the consent of, the patient. In an action brought against the first physician for the negligence of the substitute, the court held that a physician is not liable for the acts of a substitute physician, unless the substitute acts as his agent in performing the service, or due care is not exercised in selecting the substitute. The case further held that neither the consent of the patient, nor the lack of consent, is the determining factor as to whether the relation of principal and agent existed between the two physicians, but whether agency in fact had been created was to be determined by the relations actually existing between the parties under their agreements or acts.

In a leading case on this question, the Texas court declared that the substitute was in effect an independent contractor, reasoning that the nature of his work required him to exercise his own judgment and skill.[5] A similar result was reached in a New Jersey case,[6] where it was pointed out that no business relation existed between the two physicians and emphasis was placed on the distinct and independent character of the substitute's work.

It has been said that where one desiring to employ another to perform a service in his stead is obliged by law to employ a licensed person

[2] Fortner v. Koch, 272 Mich. 273, 261 N. W. 762 (1935); Grove v. Myers, 224 N. C. 165, 29 S. E. 2d 553 (1944); Swan, *The California Law of Malpractice of Physicians, Surgeons, and Dentists*, 33 CALIF. L. REV. 248 (1945); see Note, 56 A. L. R. 818 (1928).

[3] Gross v. Robinson, 203 Mo. App. 118, 218 S. W. 927 (1920); Myers v. Holburn, 58 N. J. L. 193, 33 Atl. 389 (1895); Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925); Lee v. Moore, 162 S. W. 436 (Tex. Civ. App. 1913); see Notes, 21 R. C. L. 395 (1918); 46 A. L. R. 1154 (1927).

[4] Nash v. Royster, 189 N. C. 408, 127 S. E. 256 (1925).

[5] Lee v. Moore, 162 S. W. 436 (Tex. Civ. App. 1913).

[6] Myers v. Holburn, 58 N. J. L. 193, 33 Atl. 389 (1895).

(as is the case with physicians), he is not responsible for the negligent, defective, or improper execution of the work of such person as the relation of master and servant does not exist.[7] This, however, seems to be too broad a rule. Although it may indicate, as in any other case in which skill is involved, that such master and servant relationship is not contemplated, the relationship may in fact exist. This is true even though the law requires the selection of persons for the particular work to be made from a limited class, irrespective of how limited the class may be.[8] The question of whether agency in fact existed is one for the jury to determine upon a consideration of the relations actually existing between the parties under their agreements or acts in the light of local custom.[9]

The general rule that a physician must exercise due care in selection of a substitute was recognized in *Nash v. Royster*.[10] In a Nebraska case[11] where a physician with thirty years specialized practice turned his patient over to a substitute physician of only four years experience, the principal physician was held liable on grounds of abandonment. It was pointed out by the court that the patient was in fact employing a specialist, and for the principal physician to substitute another physician of little experience without notice to or agreement by the patient was a violation of duty and abandonment of the case. It would seem that under the rule of *Nash v. Royster* requiring the exercise of due care in the selection of a substitute, North Carolina might reach the same result as the Nebraska case.

An analogous problem arises as to the liability of non-charitable[12] hospitals for the negligence and malpractice of physicians of the hospital. It seems that here though, a special situation is confronted in which liability arises out of contract and depends on whether the hospital has undertaken responsibility for the part of the treatment in which the

[7] Myers v. Holburn, 58 N. J. L. 193, 33 Atl. 389 (1895); WOOD, MASTER AND SERVANT §311 (1877).

[8] RESTATEMENT, AGENCY §223 (1933).

[9] Nash v. Royster, 189 N. C. 408, 127 S. E. 356 (1925); Tetting v. Hotel Pfister, 221 Wis. 141, 266 N. W. 249 (1936) (Defendant hotel did not ask to have submitted to the jury any question of fact with reference to the status of employment of a masseur, who, while an employee of the hotel, rendered negligent treatment to a customer; but on appeal contended that as a rule of law a licensed masseur cannot be a servant because the law requires his selection to be from a limited class and that such employees are not subject to control as to the details of their work. *Held:* That this is not a rule of law which would preclude the conclusion that a masseur may be a servant or agent.). In determining whether one acting for another is a servant or an independent contractor, see RESTATEMENT, AGENCY §220 (1933).

[10] See note 4 *supra*.

[11] Stohlman v. Davis, 117 Neb. 178, 220 N. W. 247 (1928).

[12] Hoke v. Glenn, 167 N. C. 594, 83 S. E. 807 (1914) (charitable institutions are exempt from liability under a special doctrine of public policy); Note, 19 N. C. L. REV. 245 (1941).

negligence occurred.[13] Where the hospital admits patients for treatment and the patient chooses his own physician, or where the hospital only acts as an agency for recommending or employing such physician, the hospital has been held not liable for the negligence or malpractice of such physician. But it may be liable for negligence in recommending or selecting such physician.[14] When the hospital contracts to render a certain treatment, or to perform a particular operation for a contracted price, and then undertakes to perform its part of the contract through its own physician employees, the physicians may be liable for their own negligence or malpractice, and the hospital may incur liability predicated upon contract.[15] Under the same doctrine it has been held that a company or employer who agrees to furnish medical benefits to its employees is liable only for the negligent appointment of a physician.[16] But in some jurisdictions where the employer contracts to furnish medical benefits, and then attempts to furnish such treatment in its own company hospital or infirmary and through its own company physician employees, the employer has been held liable on the same basis as hospitals which incur liability by contract.[17]

While it is true a physician may incur liability by contract, in addition to liability for his own negligence or malpractice, the physician-patient relationship does not necessarily rest on contract.[18] The physician may render his services gratuitously,[19] or at the request of some third person for the benefit of the third person only;[20] but the physician will still be liable to the patient because of the physician-patient relationship.[21] Where there is no specific contract between the patient and physician to the contrary, the physician does not guarantee to effect a cure,[22] nor is he obliged to stay on the case until his services

[13] See Note, 4 A. L. R. 191 (1919).

[14] Robinson v. Cratwell, 175 Ala. 194, 57 So. 23 (1911); Smith v. Duke University, 219 N. C. 628, 14 S. E. 2d 643 (1941); Penland v. Hospital, 199 N. C. 314, 154 S. E. 406 (1930); Johnson v. Hospital, 196 N. C. 610, 146 S. E. 573 (1929); see Note, 22 A. L. R. 346 (1923).

[15] Brown v. La Société Française, 138 Cal. 475, 71 Pac. 516 (1903); Jenkins v. Charleston Gen. Hospital, 90 W. Va. 230, 110 S. E. 560 (1922); *see* Smith v. Duke University, 219 N. C. 628, 635, 14 S. E. 2d 643, 648 (1941); see Note, 22 A. L. R. 346 (1923).

[16] McMahan v. Spruce Co., 180 N. C. 636, 105 S. E. 439 (1920); Woody v. Spruce Co., 176 N. C. 643, 97 S. E. 610 (1918); Barden v. R. R., 152 N. C. 318, 67 S. E. 971 (1910).

[17] Knox v. Ingalls Shipbuilding Corp., 158 F. 2d 973 (5th Cir. 1947); Kain v. Ariz. Copper Co., 14 Ariz. 566, 133 Pac. 412 (1913); see Note, 33 A. L. R. 1193 (1924).

[18] Thaggard v. Vafes, 218 Ala. 603, 119 So. 647 (1928); Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313 (1891); People v. Murphey, 101 N. Y. 126, 4 N. E. 326 (1886); see Note, 21 R. C. L. 375 (1918).

[19] Thaggard v. Vafes, 218 Ala. 603, 119 So. 647 (1928); Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313 (1891).

[20] People v. Murphey, 101 N. Y. 126, 4 N. E. 326 (1886).

[21] See note 19 *supra*.

[22] Davis v. Pittman, 212 N. C. 680, 194 S. E. 97 (1937); Pendergraft v. Royster, 203 N. C. 384, 166 S. E. 285 (1932), Note, 19 N. C. L. REV. 617 (1941).

are no longer needed. He may release himself, as has been noted, by giving sufficient notice to the patient to secure the services of another,[23] or by turning the case over to another physician, provided of course, he exercises due care in selecting such substitute.[24]

As a generalization, then, it seems that the prevailing view, with which North Carolina is apparently in accord, is that a physician or surgeon can relieve himself of liability for the negligent acts and omissions of a substitute physician or surgeon, provided: (1) he is under no contract which would create greater liability than that which rises out of the mere physician and patient relationship, (2) due care is exercised in selecting such substitute, (3) by the relations actually existing among the parties under their agreements or acts, agency between the physicians in fact did not exist.

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Torts—Negligence—Intervening Criminal Act

When the deceased entered the defendant's store, the defendant's fourteen-year-old son pulled a pistol from under the counter and pointed it at the deceased. Though requested to put it away, he discharged it, inflicting a fatal wound.

A suit was instituted for the wrongful death against both the defendant and his son. The plaintiff alleged that the defendant, who knew that his son had brandished the pistol at other customers, was negligent in leaving the pistol where his son could obtain possession of the dangerous instrumentality. It was further alleged that the son maliciously shot the deceased and also that the son's act was negligent. The Georgia court held that the demurrer as to the defendant should have been sustained since the son's intervening act was criminal and superseded the defendant's negligence. As to the son, the court said a cause of action, in negligence, had been stated.[1]

The statement of the general rule applicable to such cases, that a subsequent, independent and unforeseeable criminal or negligent act supersedes the original party's negligence and renders that party not liable, is followed by the Georgia court. Whether stated in terms of liability or non-liability for intervening acts, the problem of these cases is not the statement of the rule but rather the application of the rule to the facts of a particular case.

The case did not reach a jury, and the holding of the Georgia court is partially explainable under peculiar local rules of pleading. When a petition is attacked by demurrer in that state, the facts alleged are taken

[23] See note 2 *supra*. [24] See note 3 *supra*.

[1] Skelton v. Gambrell, 80 Ga. App. 880, 57 S. E. 2d 694 (1950).